

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access and)	
Services)	RM-10865

REPLY COMMENTS OF

**AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS AND
ADMISSIONS OFFICERS;
AMERICAN ASSOCIATION OF COMMUNITY COLLEGES;
AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES;
AMERICAN COUNCIL ON EDUCATION;
ASSOCIATION OF AMERICAN UNIVERSITIES;
ASSOCIATION FOR COMMUNICATIONS TECHNOLOGY PROFESSIONALS IN
HIGHER EDUCATION;
ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES;
ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES;
EDUCAUSE;
HISPANIC ASSOCIATION OF COLLEGES AND UNIVERSITIES;
INTERNET2;
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY
BUSINESS OFFICERS;
NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES;
NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT
COLLEGES;
UNIVERSITY OF CALIFORNIA

(THE "HIGHER EDUCATION COALITION")**

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THE HIGHER EDUCATION COALITION**

INTRODUCTION AND SUMMARY

The Higher Education Coalition respectfully replies to the comments submitted in response to the Further Notice of Proposed Rulemaking the above-captioned docket.¹

Based on unequivocal evidence of legislative intent and compelling public interest considerations, the Commission should clarify that the private broadband networks operated by colleges, universities, and research institutions (including network facilities that connect to the public Internet) are not covered by CALEA, or it should invoke its discretionary authority to establish an exemption for such private networks under Section 102(8)(c)(ii) of the statute. The absence of any demonstrated need to extend CALEA to Higher Education Networks,² together with the significant burdens entailed by CALEA compliance, underscore the importance of preserving such institutions' exempt status. Nothing in the comments filed by the Department of

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, FCC 05-153 (rel. Sept. 23, 2005) (“*Order*”).

² As explained in the Coalition's initial comments, the term “Higher Education Networks” refers to the private networks owned and operated by colleges, universities, and research libraries, as well as the private networks, gigapops, and other network services owned and operated by non-profit consortia of universities and related public institutions for the support of education and research. Examples include Internet2, National Lambda Rail, the Pacific Northwest Gigapop, CENIC, MOREnet, NYSERNET, and OSHEAN.

Justice (“DOJ”) or any other party diminishes the statutory and prudential case for an exemption; to the contrary, as the Higher Education Coalition and other commenters have made clear, a narrow exemption for higher education and research institutions is necessary to ensure that the Commission’s rules are faithful to congressional intent and consistent with the public interest.

DISCUSSION

I. The Commission Should Clarify That Higher Education Networks Are Not Subject to CALEA or Should Grant an Exemption.

As the Higher Education Coalition and other commenters have demonstrated, private broadband networks operated by higher education and research institutions are statutorily exempt from CALEA. Even apart from the exemption for information services in Sections 102(8)(c)(1) and 103(b)(2)(A) (which, properly read, cover the broadband Internet access services at issue), Higher Education Networks are covered by the statute’s express exemption of private networks. *See* 47 U.S.C. § 1002(b)(2)(B). Indeed, the Commission acknowledged in the *Order* that private educational networks are exempt from CALEA under this provision, but then introduced ambiguity by stating: “To the extent, however, that these private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP.” *Order* at ¶ 36, n.100.

Several commenters agree with the Higher Education Coalition that, in light of the private network exemption, the simplest way for the Commission to conform its rules to congressional intent would be to clarify that only *commercial entities* are covered by footnote 100 of the *Order*.³ Indeed, since CALEA broadly exempts “equipment, facilities, or services that

³ *See* Comments of American Library Association and Association of Research Libraries at 5; Comments of AREN Providers at 14-15; Telecommunications Industry Association Comments at 3-4.

support the transport or switching of communications for private networks”⁴ — and that exemption logically includes facilities that “*support* the connection of the private network to a public network”⁵ — the statute would appear to exempt even a commercial Internet service provider’s facilities that connect to a private educational network. In any event, there is no doubt that Congress intended all portions of private networks themselves to be exempt from CALEA. If, as DOJ suggests, every private network that provides a connection to a public network — *i.e.*, virtually all private networks operated by higher education and tens of thousands of private companies — is subject to CALEA, Congress’s express exemption of private networks would be a dead letter. That can hardly be what Congress intended.

Clarifying that footnote 100 of the *Order* extended CALEA obligations only to the networks of commercial ISPs is the most straightforward way to avoid further uncertainty and litigation regarding the application of CALEA in the context of private educational networks. Alternatively, the Commission should invoke its discretionary authority under Section 102(8)(C)(ii) to exempt educational and research institutions as a class together with the Higher Education Networks they operate.

II. Extending CALEA to Higher Education Networks Serves No Demonstrated Need and Would Impose Significant Burdens.

As shown in the Higher Education Coalition’s comments, the public interest strongly supports an exemption for Higher Education Networks because there is no demonstrated need to extend CALEA to such networks and doing so would impose significant unwarranted burdens. Higher Education Coalition Comments at 7-11. Notably, nothing in DOJ’s comments or its earlier submissions in this docket remotely suggests that higher education and research

⁴ 47 U.S.C. § 1002(b)(2)(B) (emphasis added).

⁵ *Order* at ¶ 36, n.100 (emphasis added).

institutions have been deficient in complying with any past surveillance request. The record confirms otherwise: In spite of the breadth of the University of California system, it reports that “requests seeking assistance with respect to electronic surveillance are virtually non-existent,” yet, “when such requests for assistance are issued, the University responds diligently and with dispatch, using existing infrastructure and technology.” University of California Comments at 4. DOJ has not affirmatively argued that extending CALEA is necessary to enhance law enforcement agencies’ access to Higher Education Networks (as distinct from commercial broadband networks). As the Center for Democracy and Technology, Electronic Frontier Foundation, and Pulver.com observe, imposing CALEA obligations on private network operators “turns the statutory scheme on its head” by requiring exempted entities to demonstrate that continued exemption is warranted, rather than requiring the Government “to come forward with affirmative evidence to support the extension of CALEA under the [SRP].”⁶

Nor has DOJ (or any other party) indicated or even suggested that the compliance burdens will be insubstantial for higher education and research institutions. To the contrary, the record reflects that compliance costs associated with a broad application of CALEA would impose severe hardships on colleges and universities. For example, the University of California estimates that retrofitting its networks to comply with a broad interpretation of CALEA would likely cost more than \$100 million, and Duke University estimates that such costs would amount to tens of millions of dollars.⁷ Such costs inevitably would require significant cutbacks to academic and other programs and/or force substantial tuition increases. Broad CALEA mandates in turn could impede the rapid innovation associated with campus networks, slowing the development of new applications and technologies. This rapid cycle of innovation in fact is

⁶ Comments of CDT et al. at 3; *see id.* at 3 n.2.

⁷ University of California Comments at 5-6; Duke University Comments at 2.

one of this country's great competitive assets. Therefore, even if Congress had not unequivocally indicated its intent to exempt private networks, the imposition of such compliance costs in the absence of any demonstrated need would warrant an exemption from CALEA for Higher Education Networks.

Contrary to the suggestion by DOJ that “no exemptions are appropriate based on the current record,” DOJ Comments at 11, the Higher Education Coalition's request to exempt a narrow class of private network operators is both ripe and well supported. Because the Commission has established an 18-month compliance deadline, higher education and research institutions, which establish annual budgets well in advance, must begin *now* to plan for CALEA compliance. And the Commission's failure to specify particular capability requirements or clarify the limited scope of private network operators' obligations (if any) only exacerbates the problem, as Coalition members must set aside substantial funds to ensure their ability to comply with uncertain compliance requirements.⁸ Allocating funds for possible equipment purchases, software upgrades, network redesign, and new personnel necessarily will divert funds from existing and planned academic and research initiatives and/or force tuition increases. Thus, far from being premature, an exemption for higher education and research institutions is urgently necessary.

Commenters' arguments that exempting a class of entities is unnecessary in light of the other forms of relief under CALEA are likewise unavailing.⁹ These statements overlook

⁸ See, e.g., University of California Comments at 5-6 (a broad application of CALEA could require expenditures of more than \$100 million); Duke University Comments at 2 (compliance costs could amount to tens of millions of dollars).

⁹ See DOJ Comments at 13-14 (arguing that parties should seek relief from particular capability requirements under Section 109 of CALEA); BellSouth Comments at 3 (arguing that exempting a class of entities is unnecessary in light of extensions available under Section 107 and the relief available under Section 109); USTelecom Comments at 2 (same); Verizon Comments at 7 (same).

Congress’s clearly stated intention to exempt private network operators such as higher education and research institutions. Such comments also ignore the fact that the Commission’s failure to define assistance-capability requirements or indicate any timetable for doing so would prevent higher education and research institutions from “present[ing] quantitative cost information that is . . . detailed, accurate, and complete” to justify relief under Section 109 (or to obtain extensions under Section 107).¹⁰ Moreover, as noted above, because such institutions must develop their budgets well in advance, they have no choice but to set aside funds for compliance presently — *i.e.*, likely before assistance-capability requirements have been defined, and certainly before vendors have developed appropriate solutions and implementation costs can be calculated with precision. Only an exemption for Higher Education Networks in the current rulemaking can prevent unwarranted compliance burdens.¹¹

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Higher Education Coalition’s initial comments, the Coalition respectfully requests that the Commission clarify the exempt status of private educational and research networks, or alternatively establish an exemption for Higher Education Networks under Section 102(8)(C)(ii) of CALEA. If the Commission declines to provide such a clarification or establish such an exemption, as the Coalition explained in its initial comments, the Commission should make clear that CALEA applies at most to Internet connection facilities, and that higher education and research

¹⁰ DOJ Comments at 14 (quoting *CALEA Second Report and Order*, 15 FCC Rcd 7105, ¶ 39).

¹¹ As DOJ readily agrees, “[i]t is not necessary for the Commission to adopt special procedures just for consideration of Section 102(8)(C)(ii) exemption requests.” DOJ Comments at 20. And the Commission can clarify the scope of footnote 100 of the *Order* without establishing new exemptions at all.

institutions may phase in CALEA-compliant facilities as existing equipment is replaced over a five year period.

Respectfully submitted,

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